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No. 91-1721

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA AND TOMMY HAZOURI, in his official capacity as Mayor of the city of Jacksonville,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATES OF OHIO AND MICHIGAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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No. 91-1721

IN THE SUPREME COURT OF THE UNITED STATES

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NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the city of Jacksonville,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF THE STATES OF OHIO AND MICHIGAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The States of Ohio and Michigan have promulgated minority business enterprise legislation ("MBE programs") designed to redress discrimination based on race, sex, or nationality in respect to the award of public contracts. Because these programs play an important role in leveling, within constitutional limits, the playing field of government-contract bidding, it is essential that any complaint challenging an MBE program contain allegations reflecting unmistakably the right of the plaintiff to sue. First and foremost, the complaint must contain information sufficient to satisfy all the constitutional and jurisprudential requirements, including standing, associated with invoking the jurisdiction of a federal court.

In the instant case, Petitioner challenges the MBE program of the city of Jacksonville and proffers what Amici States assert is an incomplete test for establishing its standing to sue. Petitioner's standard relaxes the traditional test for evaluating standing, not only in general, but specifically in respect to challenges to race-conscious programs. Because this poses a threat to the proper operation of said programs and will unnecessarily tax the legal and financial resources of any state employing such a program to help eradicate discrimination, Amici states file this brief in support of Respondents and urge this Court to affirm the judgment of the United States Court of Appeals for the Eleventh Circuit.

SUMMARY OF ARGUMENT

1. Subsequent to the Court's grant of a writ of certiorari in this case, the City of Jacksonville repealed the portion of its Purchasing Code challenged by Petitioner and substituted for it a significantly revised legislative scheme. Consequently, this case is before this Court in a posture similar to that of *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam), a case rendered moot by legislative changes, or *Fusari v. Steinberg*, 419 U.S. 379 (1975), in which the Court determined that substantive changes in the legislation in question prevented the Court from "meaningfully . . . assess[ing] the issues in this appeal on the present record." *Id.* at 387. As a result, this action should be remanded with instructions to the courts below to dismiss without prejudice, or the judgment should be vacated and the case remanded with instructions to give Petitioner a reasonable opportunity to amend its complaint. *See id.*, 419 U.S. at 390. *See also Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 412 (1972).

2. In the event this Court chooses to address the question of standing, it must do so "in light of [Jacksonville] law as it stands now, not as it stood when the judgment below was entered." *Diffenderfer*, 404 U.S. at 414. Under the new or old Jacksonville MBE program, however, Petitioner's theory for establishing its standing represents a departure from the Court's historical perspective on the subject and is

inconsistent with the Court's application of the standing doctrine in relevant cases, such as *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and *Warth v. Seldin*, 422 U.S. 490 (1975).

ARGUMENT

I. SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI IN THIS CASE, RESPONDENTS REPEALED THE LEGISLATION BEING CHALLENGED HEREIN AND REPLACED IT WITH A SIGNIFICANTLY DIFFERENT LEGISLATIVE SCHEME. CONSEQUENTLY, THIS CASE IS MOOT AND SHOULD BE DISMISSED. IN THE ALTERNATIVE, BECAUSE THE CHANGES IN LEGISLATION MAKE IT DIFFICULT TO ADJUDICATE THIS CASE BASED ON THE PRESENT RECORD,THE JUDGMENT OF THE COURT BELOW SHOULD BE VACATED AND THE CASE REMANDED WITH INSTRUCTIONS TO PERMIT PETITIONER TO AMEND ITS COMPLAINT.

The Eleventh Circuit ruled that Petitioner did not have standing to challenge Jacksonville's MBE program and remanded the case to the district court with instructions to dismiss without prejudice. Subsequent to the judgment below and the grant of certiorari, the City of Jacksonville repealed the ordinances challenged in this case and replaced them with a new legislative scheme. *Compare* City of Jacksonville Ordinance Code § 126.601-.613 (1988), *with* City of Jacksonville Ordinance Code § 126.601- .617 (1992). *See* Appendix to Respondent's Motion to Dismiss. This turn of events has rendered this case moot, or, at the very least, has made additional review by the lower courts necessary.

A. This Case Is Moot.

1. Petitioner, plaintiff below, challenges Jacksonville's MBE program, which "sets aside" for minority businesses

a small percentage of the city's construction work, because it allegedly bars Petitioner's non-minority members from competing for that work and because it was established without the benefit of a formal study documenting the existence of prior discrimination within Jacksonville, as required by this Court's decision in *City of Richmond v. Croson Co.*, 488 U.S. 469 (1989). See Complaint, Joint Appendix at 7. According to Respondent's Motion to Dismiss as Moot, however, the ordinance actually under attack has been repealed and replaced with an MBE program that is significantly different: not only was the new ordinance promulgated after a *"Croson"* study, but "[u]nder the new ordinances, all bidders are unquestionably permitted to compete for [all] city contracting . . . ." Memorandum in Support of Respondents' Motion to Dismiss as Moot, at 8-9, 11. As a result, the purported outright bar against non-minority contractors competing for "set-asides" and the lack of a study documenting the appropriateness of an MBE program, the twin foundations of Petitioner's legal challenge, no longer are components of Jacksonville law or at issue in this case.

Thus, this Court is presented with circumstances not unlike those in *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam):

> . . . the regulation at issue is no longer in force. Furthermore, the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution. Thus, the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

When a case becomes moot pending appeal, the Court's custom is to "reverse the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950) (footnote omitted). *Accord, Duke Power*

Company v. Greenwood County, 299 U.S. 259, 267 (1936) (dismissal of case that becomes moot pending appeal is the "duty of the appellate court").

That the circumstances of this case result in a finding of mootness was presaged by the Court's opinion in *Croson*. In *Croson*, the plaintiff, unlike Petitioner here, sought damages in addition to prospective relief. Richmond's MBE program expired on June 30, 1988, over three months prior to argument before the Court and almost seven months prior to the decision. The Court addressed the issue of mootness in a footnote, explaining that "[t]he expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages." *Croson*, 488 U.S. at 478 n.1 (citations omitted). Thus, the strong implication of the preceding passage is that in respect to prospective relief, the case *was* moot. Although the challenged Jacksonville ordinances, rather than having expired, have been repealed, the effect is the same — they no longer exist.

Although the plain language of *Princeton* appears dispositive on the issue of mootness, a discussion of mootness in the context of this case would not be complete without some mention of what may, on first blush, appear to be a competing line of the Court's cases. For example, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), a case argued the same day as *Princeton* and decided approximately one month later, the Court refused to declare moot a case in which judicially invalidated legislation was repealed while an appeal was pending before the Fifth Circuit. The Court noted that "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S. at 289.

But the Court's statement cannot be separated from the peculiar facts of that case:

> In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated (footnote omitted). The city *followed that course* with respect to the age restriction, and then, *in obvious response to the state court's judgment*, the exemption was eliminated. There is *no certainty that a similar course would not be pursued* if its most recent amendment were effective to defeat federal jurisdiction.

City of Mesquite, 453 U.S. at 289 (emphasis added). Clearly, the Court was concerned with acts committed in bad faith by the defendant in *City of Mesquite* — manifested not only by its history of repealing and reinstating constitutionally offensive language in an effort to frustrate judicial intervention, as noted above, but its "announced . . . intention" to reenact the very provision challenged if the district court's judgment was vacated, *id.*, 455 U.S. at 289 n. 11 — and was determined to prevent the defendant from engaging further in this questionable conduct.

In the case at bar, there is no evidence or history to indicate that Jacksonville changed its law in an effort to thwart federal jurisdiction. Unlike Mesquite, Jacksonville did not merely delete some language from its law, but replaced that law. Certainly, there is nothing in Jacksonville's conduct to suggest that if this case is dismissed as moot that it will reenact its old MBE program. And it cannot be ignored that unlike the defendant in *City of Mesquite*, Jacksonville changed its law *after* receiving a *favorable* judicial decision.

Moreover, the Court in *City of Mesquite* framed the mootness inquiry as follows:

> A question of mootness is raised by the revision of the ordinance that became effective while the case was pending in the Court of Appeals. When that court decided that the term "connections with criminal elements" was unconstitutionally vague,

> that language was no longer a part of the ordinance. Arguably, if the court had been fully advised, it would have regarded the vagueness issue as moot. It is clear to us, however, that it was under no duty to do so.

City of Mesquite, 555 U.S. at 288. The Court's choice of language seems to indicate that while the court of appeals had no duty to declare the case moot, neither was it prohibited from doing so. Thus, because of the specific circumstances of *City of Mesquite* and the fact that it was decided so closely on the heels of *Princeton*, it is unlikely that the Court in *City of Mesquite* was repudiating the holding or logic of *Princeton* as a general proposition of law. Indeed, if the rule in *City of Mesquite* was subject to universal application, the Court in *Croson* undoubtedly would have relied on it, rather than explaining that *Croson* was not moot because of the remaining issue of damages.

Although the Eleventh Circuit based its decision on Petitioner's lack of standing rather than mootness, it nevertheless dismissed the case without prejudice which, under the current circumstances, was the correct result. This Court may, therefore, affirm the judgment of the court of appeals. *See Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987) ("We granted certiorari . . . and now affirm, but on different grounds.").

B. At The Very Least, The Judgment Should Be Vacated And The Case Remanded For Additional Proceedings.

Of course, rather than dismissing the case on grounds of mootness, this Court could vacate the judgment and remand the case to permit Petitioner, if it so chooses, to amend its complaint in order to mount a challenge to the new Jacksonville ordinances. This was the approach selected by the Court in *Fusari v. Steinberg*, 419 U.S. 379 (1975).

Fusari involved a Connecticut law that underwent major revisions between the time the Court noted probable jurisdiction and the time allotted for briefing on the merits. Because of these revisions, the Court concluded that it was "unable meaningfully to assess the issues in this appeal on the present record." *Fusari*, 419 U.S. at 387. Rather than declaring the case moot, the Court vacated the judgment below and "remanded for reconsideration in light of the intervening changes in Connecticut law." *Id.* at 390.

The Court followed a similar course in *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972) (per curiam). In *Diffenderfer*, the plaintiff challenged on First Amendment grounds a Florida statute which exempted completely from state taxation a church-owned parking lot utilized for both church and commercial purposes. A three-judge district court upheld the statute and an appeal was taken. By the time the dispute reached the Court, however, the Florida statute involved had been repealed and replaced with different legislation.

On review, the Court, as an initial matter, noted that it "must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer*, 409 U.S. at 414. Next, the Court concluded that the case was not one "capable of repetition, yet evading review . . . , nor is it the kind of case that may produce irreparable injury if not decided immediately," *id*, because

> the only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06(4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed.

Diffenderfer, 409 U.S. at 414-15. Rather than dismissing this case as moot, pursuant to *Munsingwear*, the Court, "[b]ecause it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly enacted legislation," vacated the judgment and remanded "with leave to the appellants to amend their pleadings." *Diffenderfer*, 404 U.S. at 415.

Regardless of whether this case is dismissed on grounds of mootness, as in *Munsingwear* and *Princeton*, or the judgment is vacated and remanded with additional instructions, as in *Fusari* and *Diffenderfer*, the point is that the case is not in the proper posture for this Court to review. In short, no purpose is served by determining whether Petitioner has standing to challenge a legislative scheme that no longer exists.

Moreover, this Court should not be placed in the position of having to evaluate, for purposes of establishing Petitioner's standing to sue, the relevant differences between the old and new law, not as a court of ultimate review, but as a court of original jurisdiction. That is exactly the role this Court will be forced to play, however, if it attempts to determine on the record before it whether or not Petitioner has standing to challenge the new Jacksonville MBE program.

Neither the district court nor the court of appeals has had an opportunity to evaluate Petitioner's standing under the current Jacksonville law. This Court should give those courts the opportunity to perform their traditional role, while at the same time, relieving itself of the obligation of doing the lower courts' work for them.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER LACKS STANDING TO CHALLENGE JACKSONVILLE'S MBE PROGRAM

If this Court determines, however, that it is appropriate to address the standing question, it must, as a preliminary matter, heed a previously discussed rule from *Diffenderfer:* "This Court must review the judgment of the [court below] in light of [Jacksonville] law as it now stands, not as it stood

when the judgment was entered." *Id.*, 404 U.S. at 414. This means the new Jacksonville ordinances, not the repealed versions, must provide the framework for this Court's decision.

A. MBE Programs Are Important Tools For Eradicating Documented Discrimination. An Associational Plaintiff Must, Therefore, Plead Sufficient Facts To Demonstrate Its Standing To Sue.

States and municipalities are authorized to "eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the [government] itself." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring). Toward that end, government at all levels has a compelling interest in "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492.

In order to further this compelling interest, a state or municipality, provided it can demonstrate the existence of prior discrimination, may develop remedial procedures in respect to the award of public contracts, including the institution of MBE programs. *See id.* at 504. MBE programs by their nature, are designed to facilitate the award of government contracts to minority businesses. Businesses operated by individuals who are not "minorities" within the meaning of the MBE statutory scheme, therefore, will be excluded to some extent from participating in the MBE program.

Because MBE programs can serve as useful weapons in any state or municipality's arsenal for eliminating discrimination, any challenge to their constitutionality must unmistakably satisfy the "case or controversy" requirements of Article III. This is particularly true when the party raising the constitutional challenge is an association that has

suffered no injury itself and sues merely in a representative capacity.

As a result, in order for such an association to demonstrate it has standing to challenge the constitutionality of an MBE program, it must recite in its complaint more than the obvious — that unidentified non-minority members of the organization have been or may be precluded from competing for equally unidentified government contracts because of the operation of the MBE legislation — and must, at a minimum, identify in its complaint particular contracts that specific members were prohibited from competing for because of the requirements of the MBE program. *See Warth v. Seldin*, 422 U.S. 490, 516 (1975) ("complaint refers to no specific project of any of [association's] members that is currently precluded . . . ") ; *see also Lujan v. Defenders of Wildlife*, ___ U.S. ___ , 112 S.Ct. 2130, 2138 (1992) (" 'some day' intentions . . . [of association's members] without any description of concrete plans" not enough to establish standing). A less demanding pleading requirement will serve only to justify purely speculative allegations concerning predicted conduct of unspecified association members, expose MBE programs to frivolous lawsuits, and strain the legal resources of states and political subdivisions.

B. The Judgment Below Was Mandated By This Court's Prior Cases On Standing.

Amici States agree with Petitioner that the Eleventh Circuit's position regarding standing is too restrictive. In the appellate court's defense, however, it may well be that it was troubled by Petitioner's "bare-bones" complaint, a complaint that did nothing more than describe the purpose and effect of many MBE programs.

Nevertheless, we agree that the court of appeals' reliance on a test predicating standing on an ability to demonstrate that but for the MBE program, one of Petitioner's non-minority members would have been awarded a specific contract, is not supported by the Court's cases discussing standing. *See,*

e.g., University of California Regents v. Bakke, 438 U.S. 265 (1978), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977). Consistent with those cases, the proper standard for evaluating Petitioner's standing is interference with a specific member's right "to compete." *Bakke,* 438 U.S. at 280 n.14. There is no requirement that a plaintiff demonstrate that the only impediment to the award of a particular contract was the existence of an MBE program. *See id.*

It does not follow, however, that the judgment below should be reversed. It still must be asked what allegations are sufficient to demonstrate Petitioner has standing to sue within the context of this specific controversy:

> Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to determine whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

Allen v. Wright, 468 U. S. 737, 753 (1984).

Often "the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Id.* at 751 (citations omitted). An excellent basis for comparison to the complaint in this case is the complaint in *Warth v. Seldin,* 422 U.S. 490 (1975), a case that addressed directly the standing of an association.

In *Warth,* the petitioners sought declaratory and injunctive relief and damages from the town of Penfield, New York, claiming the town's zoning ordinance, on its face and as applied, prevented the construction of low-and-moderate income housing. The district court dismissed the complaint and denied motions to intervene filed by two associations. The Second Circuit affirmed on the ground that none of the plaintiffs or the applicants to intervene had standing. This Court also affirmed on the basis of lack of standing.

One of the intevernors, Rochester Home Builders Association, "an association of firms engaged in residential construction," 422 U.S. at 497, claimed the allegedly discriminatory zoning ordinance "arbitrarily and capriciously prevented its member firms from building low-and-moderate-cost housing in Penfield, and thereby . . . deprived them of potential profits." 422 U.S. at 492. The Court, after rejecting Home Builders' claim for damages, turned its attention to the association's request for declaratory judgment and injunctive relief and noted the following:

> Home Builders' prayer for prospective relief fails for a different reason . . . . The complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

Warth, 422 U.S. at 516.

The Court's analysis in *Warth* easily can be applied to the case at bar. Petitioner's complaint "refers to no specific project" upon which any of its members have been prevented from bidding because it was set aside exclusively for minority businesses. Petitioner's complaint also fails to identify any bid submitted and rejected for consideration because of the requirements of Jacksonville's MBE program. And, Petitioner's complaint does not contain an allegation that any of its members submitted bids for a specific project and attempted unsuccessfully to qualify under any available

exception to the application of the law. Petitioner did plead that "numerous non-minority members of Plaintiff have been deprived of substantial economic and business opportunities," but that is no more sufficient to establish standing than it was for Home Builders to plead in its complaint in *Warth* that its members were "deprived of potential profits."

The seminal *Bakke* case provides another good comparison. In *Bakke*, a white applicant for admission to the University of California at Davis's medical school challenged the medical school's special admissions program for minorities. The program reserved sixteen of the 100 available seats in the first year class for minority students whose academic credentials did not satisfy the usual admission requirements. Bakke, who failed to secure admission through the traditional admissions process, had academic qualifications superior to those required of candidates for the special admissions program.

Although standing was not the focus of the Court's inquiry in *Bakke*, it nevertheless was addressed. According to the Court, Bakke's standing was not dependent on his ability to "prove that he would have been admitted in the absence of the special program." *Bakke*, 438 U.S. at 281 n.14. Instead, Bakke was injured by "the University's decision not to permit him to compete for all 100 places in class, simply because of his race." *Id.*

It is instructive to examine Bakke's complaint to identify the steps Bakke took in his own behalf and the conduct of the University that placed him in position to sue. First, Bakke selected a specific medical school to which he sought admission. Second, he then actually applied for admission. This, of course, required him to complete all necessary paperwork and submit it for consideration. Finally, his application for admission was rejected. Thus, while Bakke was not required to demonstrate that his exclusion from medical school was a direct result of the operation of the special admissions program, he actually had applied for admission prior to complaining that the special admissions

program prohibited him and others like him from being considered for admission.

In stark contrast stands the complaint of Petitioner. It does not identify a specific member or members who have been denied the opportunity to compete. It does not identify any paticular contract of interest to any of its members. It does not indicate that any of its members submitted bids for any of the projects subject to Jacksonville's MBE law. And, in light of the changes in Jacksonville's MBE program, it does not plead with any particularity whatsoever how the new law, on its face, precludes any of its members from submitting bids and competing for particular projects. In short, Petitioner's complaint is bereft of any of the allegations or reference to the circumstances that distinguished the complaint in *Bakke*.

The Court's wisdom expressed in *Allen*, that a dispute over standing can best be resolved by comparing complaints from earlier standing cases to the complaint at issue, is compelling here. Indeed, when compared to the complaints in *Warth* and *Bakke*, Petitioner's complaint is woefully inadequate and fails to establish standing under either the old or new Jacksonville legislative scheme. Petitioner's complaint resembles the flawed complaint submitted by Home Builders in *Warth* much more than it resembles the complaint in *Bakke*. Under the circumstances, it deserves to suffer the same fate as Home Builders' complaint.

C. The Formulation For Standing Offered By Amici States Ohio And Michigan Best Serves Public Policy.

Three competing rules for establishing standing have been presented for this Court's consideration — the rule forming the basis of the Eleventh Circuit's decision, the rule proposed by Petitioner, and the rule that Amici States urge this Court to adopt. Of the three, only the last, as discussed above, comports with this Court's precedents. Only the last strikes the proper balance between assuring litigants that the doors to the courthouse will remain open and removing those doors

from their hinges.

On one hand, the Eleventh Circuit's rule is unduly restrictive. Its adoption by this Court will place a severe burden on any associational plaintiff seeking to vindicate its members' rights to equal opportunity.

On the other hand, judgment for Petitioner will dramatically reduce the effectiveness of a motion to dismiss as a mechanism for challenging the standing of an association acting in nothing more than a representative capacity. The association will be under no obligation whatsoever, prior to initiating suit, to obtain the sort of information concerning its members' business relations with a government entity that is within its, or its members', possession. Petitioner's rule also will encourage such an association to initiate suit attacking significant social legislation without first establishing that any of its members have been injured in a particularized fashion sufficient to invoke federal jurisdiction and present a federal court with a concrete case or controversy. *See Defenders of Wildlife*, 112 S.Ct. at 2138 (association's members must establish "continuing, present adverse effects" in order to obtain injunctive relief) (citations omitted).

If MBE programs are to function as intended, designating a small percentage of government contracts for minority businesses in order to remedy past discrimination, it goes without saying that non-minority contractors may be ineligible for those contracts. And while government should never be permitted, without justification, to exclude non-minority contractors from the competition for public contracts, neither should the importance of MBE programs be slighted by permitting Petitioner to proceed under the improper and relaxed standing requirements it proposes.

CONCLUSION

The judgment of the Eleventh Circuit should be affirmed or, in the alternative, the judgment should be vacated and the case remanded with instructions to permit Petitioner to amend its complaint.

Respectfully submitted,

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January 1993

Filed Jun 20 1974

Laurence P. Henigan, Clerk

By William Franas Deputy

In the Superior Court of the State of California,
In and for the County of Yolo

No. 31287

COMPLAINT FOR MANDATORY, INJUNCTIVE, AND DECLARATORY RELIEF

Allan Bakke,
Petitioner and Plaintiff,

-vs.-

The Regents of the University of California,
Defendants and Respondents.

FIRST CAUSE OF ACTION

Petitioner and plaintiff ALLAN BAKKE (hereinafter called plaintiff) alleges for a first cause of action:

I.

That plaintiff is a citizen of the State of California and of the United States of America.

II.

That defendants and respondents The Regents of the University of California (hereinafter called defendants) are public officers of the State of California, maintaining, operating and administrating the School of Medicine, University of California, Davis, Yolo County, California (hereinafter called said Medical School); that said Medical School is supported by public funds and tax monies and

receives federal financial assistance.

III.

That plaintiff duly and timely filed his applications with said Medical School for admission to the first-year classes of said Medical School commencing in September, 1973, and September 1974; that in each year, respectively, plaintiff received notification from said Medical School that his applications were denied.

IV.

That plaintiff was and is in all respects duly qualified for admission to said Medical School and the sole reason his applications were rejected was on account of his race, to-wit, Caucasian or white, and not for reasons applicable to persons of every race, as follows:

That a special admissions committee composed of racial minority members evaluated applications of a special group of persons purportedly from economic and educationally disadvantaged backgrounds; that from this group a quota of 16%, or 16 out of 100 first-year class members, was selected; that in fact, all applicants admitted to said Medical School as members of this group were members of racial minorities; that under this admission program racial minority and majority applicants went through separate segregated admission procedures with separate standards for admissions; that the use of such separate standards resulted in the admission of minority applicants less qualified than plaintiff and other non-minority applicants who were therefore rejected.

V.

That by reason of the action of defendants in excluding plaintiff from the first-year Medical School class under defendants' minority preference admission program, plaintiff has been invidiously discriminated against on account of his race in violation of the Equal Protection Clause of the

Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Art. 1, sec. 21), and the Federal Civil Rights Act (42 U.S.C. sec. 200(d).).

VI.

That plaintiff has no plain, speedy or adequate remedy at law.

SECOND CAUSE OF ACTION

Plaintiff alleges for a second cause of action:

I.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through VI of his first cause of action set forth above.

II.

That plaintiff will suffer substantial and irreparable harm by reason of the continued refusal of defendants to admit him to said Medical School.

THIRD CAUSE OF ACTION

Plaintiff alleges for a third cause of action:

I.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through VI of his first cause of action set forth above.

II.

That a bonafide and genuine dispute exists between Plaintiff, on the one hand, and, defendants, on the other hand, as to plaintiff's right to be admitted to said Medical

School.

WHEREFORE, plaintiff prays:

1. That this Court issue its alternate writ of mandate directing defendants to admit plaintiff to said Medical School, or to appear before the above entitled Court and show cause why said admission to said Medical School may be denied plaintiff.

2. That the above entitled Court issue its order directing defendants to appear and show cause why they should not be enjoined during the pendency of this action and permanently from denying plaintiff admission to said Medical School.

3. That this Court enter its judgment declaring that plaintiff is entitled to admission to said Medical School; and, further declaring, that defendants are lawfully obligated to admit plaintiff to said Medical School.

4. For such other and further relief as to this Court may seem proper.

JACOBS, BLANKENBURG, MAY & COLVIN

By Reynold H. Colvin
Attorneys for Plaintiff